U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 June 2005

CASE NO.: 2003-LHC-2862

OWCP NO.: 07-150504

IN THE MATTER OF:

PHILLIP ALLEN

Claimant

v.

DANOS & CUROLE MARINE

Employer

and

GRAY INSURANCE COMPANY

Carrier

APPEARANCES:

KAREN WIEDEMANN, ESQ.

For The Claimant

DOUGLASS M. MORAGAS, ESQ.

For The Employer

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Phillip Allen (Claimant) against

Danos & Curole Marine (Employer) and Gray Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on January 18, 2005, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered five exhibits,[1] Employer/Carrier proffered 18 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from Claimant and Employer by the brief due date of February 22, 2005.

On March 28, 2005, the undersigned approved a Section 8(i) Settlement Agreement submitted by the parties which compromised and resolved the issues of all compensation benefits due to Claimant under the Act and all medical benefits due Claimant with the exception of contested medical bills incurred with The Louisiana Clinic and St. Charles General Hospital, the liability of which is disputed and presented for resolution in this Decision and Order.

Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on September 9, 1998.

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[1] Counsel for Claimant proffered Claimant's Exhibit No. 5 (CX-5) with the post-hearing brief. Employer/Carrier have expressed no objection to its receipt and therefore CX-5 is hereby received into the record.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That Employer/Carrier were notified of the accident/injury on September 9, 1998.

5. That Employer/Carrier filed a Notice of Controversion on November 19, 1998.

6. That an informal conference before the District Director was held on January 24, 2001.

7. That Claimant received compensation benefits totaling $110,483.10.

8. That Claimant's average weekly wage at the time of injury was $676.63.

9. That medical benefits for Claimant have been paid in the amount of $13,853.22 as of November 18, 2004, pursuant to Section 7 of the Act.

10. That Claimant reached maximum medical improvement on October 8, 2002.

11. The amount of claimed/contested unpaid medical expenses and costs is no more than $61,440.98.

II. ISSUES

The unresolved issues presented for resolution by the parties are:

1. Whether Employer/Carrier are responsible to reimburse Claimant for the expenses and costs of lumbar surgical procedures at St. Charles General Hospital and expenses and costs of treatment by Dr. Kenneth Adatto of The Louisiana Clinic.

2. Whether such expenses and cost were authorized by Employer/Carrier and/or whether such expenses and costs were reasonable and necessary.

3. Extent of attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed in his third party law suit on November 22, 1999. (EX-16). He described his September 9, 1998 work accident/injury on a Texaco platform in the Gulf of Mexico. He and one operator from Texaco were left on the platform after non-essential personnel were evacuated because of a hurricane entering the Gulf. (EX-16, pp. 39, 52-54).

While tying down and trying to plug the sump pump, he recalled being hit by a 25-foot wave which felt like a cement wall. (EX-16, p. 61). He was attempting to tighten a coupling with a wrench when the wrench slipped causing him to fall back, hitting his back on the pipe behind him and "I bounced off by the wind blowing so hard that . . . I tripped over another pipe, falling and hitting the grating on the handrail, my back on the grating." (EX-16, pp. 64-66). He reported his neck, back and stomach problems to the Texaco operator. (EX-16, pp. 71-72).

Claimant completed his assigned hitch but contacted his Employer while still on the platform to seek medical care upon his return to shore. (EX-16, p. 76). Employer made an appointment for Claimant with Dr. Bourgeois in Morgan City, Louisiana, who treated his back and neck complaints. (EX-16, pp. 76-77). Claimant testified that he began treating with Dr. Adatto in New Orleans, Louisiana, which was arranged by his attorney, Mr. Wiedemann. (EX-16, p. 79). He has also been evaluated and treated by a psychiatrist, Dr. Mielke in New Orleans, Louisiana. (EX-16, p. 83).

The Medical Evidence

Lakewood Medical Center

Claimant was treated at Lakewood Medical Center on September 14, 1998, for his offshore fall. He complained of neck and back pain with dizziness but no numbness and tingling. On examination, he had no point tenderness, no spasm and was able to ambulate. He was diagnosed with a muscle strain secondary to his work place fall. (EX-4, pp. 8-9).

Dr. Melvin Bourgeois

Dr. Bourgeois initially treated Claimant on September 14, 1998. Claimant reported his accident offshore and complaints of injuries to his stomach, back, neck and also of having dizziness. Objective findings were contused low back and stomach. (EX-4, p. 2). Dr. Bourgeois concluded that Claimant was capable of returning to his same work as before the injuries and was released from treatment on September 18, 1998. (EX-4, p. 4).

Dr. Kenneth N. Adatto

Claimant was examined by Dr. Adatto on September 22, 1998, at the behest of Counsel for Claimant. Claimant complained of severe low back pain with leg pain on the right side in a L4-5, L5-S1 pattern to the hip, thigh, lower leg and foot. Claimant also reported severe neck pain with discomfort on both sides in a C5-6, C6-7 pattern. (CX-3, pp. 37-38). On clinical examination, Claimant exhibited mild spasm of the cervical spine area with limited motion, no tenderness and full range of motion. His lumbar spine showed limited motion with spasm, no tenderness with neurovascular status normal. (CX-3, p. 38). X-rays of the cervical area revealed longstanding anterior spur formations and was otherwise normal as was the lumbar area.

Dr. Adatto's impression was cervical and lumbar syndrome which should respond to conservative care with pre-existing arthritis which was asymptomatic prior to Claimant's work accident. (CX-3, p. 39). On October 6, 1998, Dr. Adatto recommended Claimant undergo an aggressive physical therapy program. (CX-3, p. 34). On November 3, 1998, Claimant returned for follow-up reporting that physical therapy was not helping much. (CX-3, p. 33). An MRI and CT scan of the lumbosacral spine conducted on December 4, 1998, revealed the L3-4 disc area desiccated and a small herniation (Type IIa) into the right neural foramen. (CX-3, pp. 31-32).

On January 5, 1999, Dr. Adatto reported that Claimant was getting worse rather than better and could not manage his pain. Surgery versus non-surgery was discussed with Claimant. Dr. Adatto noted that disability would be the same with or without surgery. (CX-3, p. 29). On February 4, 1999, Dr. Adatto opined that Claimant needed an anterior lumbar fusion at L3-4. (CX-3,

p. 28). On April 19, 1999, Dr. Adatto noted that orthopedic treatment was delayed until Claimant's cancer came under control. (CX-3, p. 27). On August 9, 1999 and September 27, 1999, Dr. Adatto administered Marcaine injections for trigger point relief. (CX-3, pp. 25-26). Claimant continued to follow-up with Dr. Adatto through March 22, 2000, when he was again administered injections bilaterally. (CX-3, pp. 22-24).

An MRI dated May 18, 2000, revealed a mild broad-based posterior herniated disc (Type IIb) at L3-4 whereas the December 4, 1998 MRI showed a Type IIa herniation. (CX-3, p. 21). Claimant received additional injections for continued pain on July 13, 2000 and August 10, 2000. (CX-3, pp. 20-21). On September 14, 2000, Dr. Adatto indicated Claimant "has clearance for surgery in mid-October," however did not identify from whom such clearance was obtained. (CX-3, p. 19).

Dr. Adatto performed an anterior lumbar discectomy and anterior lumbar fusion on October 18, 2000. (CX-3, pp. 15-16). Post-operative follow-up in October and November 2000 showed Claimant doing "a little better each time," with leg findings absent. (CX-3, pp. 10, 17-18). By January 4, 2001, Claimant was "slowly getting better," with negative leg findings. (CX-3, p. 6). On February 8, 2001, Dr. Adatto noted that Claimant "continues with back pain and bilateral leg pain" and reported his pain "is essentially the same as it was before surgery at this point." (CX-3, p. 5). By April 10, 2001, Claimant was "having a little more trouble than he would like to see." (CX-3, p. 3). On July 19, 2001, the last report of Dr. Adatto, Claimant was exhibiting lumbar spine spasm and tenderness. Dr. Adatto administered Marcaine injections. (CX-3, p. 1).

Dr. A. Delmar Walker, Jr.

On December 14, 1998, Dr. Walker examined Claimant at the request of Carrier. He concluded that Claimant suffered a muscular strain of the neck and low back region with subjective complaints, but no objective abnormalities suggesting nerve root irritation in the cervical or lumbar area. He opined that Claimant was able to return to active employment and recommended a two-week period of light duty. He further opined that based on his examination and findings Claimant would fully recover within a matter of weeks. (EX-6, p. 3).

On June 1, 1999, Dr. Walker reviewed additional records and diagnostic tests of Claimant. He concluded that Claimant "displays an exaggerated degree of symptomatology that does not

correlate well with the mild abnormality noted on the MRI scan and CT scan." He recommended "a close look at [Claimant's] emotional state and credibility" before recommending a surgical procedure for a "poorly defined diagnosis based primarily on [Claimant's] subjective pain complaints which are not supported by objective abnormalities . . . ." He suggested the only diagnosis supported by the objective evidence was a lumbar strain temporarily aggravating a pre-existent degenerative disc disease. He also concluded that Claimant's multitude of symptoms "certainly cannot be explained by a mild right sided L3 disc bulge and focusing surgical treatment in that area I think is likely to result in little chance of improvement, and there is a significant chance of worsening of this man's overall condition." (EX-6, p. 1).

Dr. Christopher Cenac

Dr. Cenac examined Claimant on June 15, 1999, apparently at the request of DDS (Disability Determination Services, Social Security Administration). Claimant complained of low back and neck pain with radicular pain in both legs and referred pain to both shoulders. Claimant exhibited multiple and positive Waddell signs with illness behavior and symptom magnification. No muscle spasm was observed and the reflex exam was normal. (EX-5, p. 9).

X-rays of the cervical and lumbar spine were read as normal. Dr. Cenac reviewed a copy of the CT scan taken on December 4, 1998 which confirmed a small herniation into the right neural foramen but with no evidence of nerve root impingement or cord compression. Dr. Cenac opined that from an orthopedic standpoint Claimant was able to return to his prior employment with no physical limitations assigned. (EX-5, p. 10).

Dr. George A. Murphy

At the behest of the Department of Labor (DOL), Dr. Murphy performed an Independent Medical Examination of Claimant on June 17, 1999. He observed that the quality of the MRI and CT scans were poor. The physical examination revealed a full range of motion in the cervical spine with no spasm, neurological was intact and no spasm in the lumbar region. He opined Claimant needed additional diagnostic testing. He suggested Claimant may benefit from epidural steroid injection and with his history of colon cancer surgery and chemotherapy, he would "try to avoid surgery." (EX-7, pp. 2-3).

On December 7, 1999, Dr. Murphy opined, after reviewing an EMG and MRI report, that the EMG showed S1 radiculopathy bilaterally and the MRI revealed bulging at the last three lumbar discs. He further opined that Claimant was a candidate for epidural steroid injection and lumbar surgery. Since the MRI did not indicate which level was symptomatic, he suggested Claimant may need lumbar myelogram, discogram and a CAT scan to determine what surgery would help, but such testing should be left up to Claimant's treating physician. (EX-7, p. 1).

Dr. George R. Cary, Jr.

On February 1, 2000, Dr. Cary examined Claimant and reviewed x-rays of the cervical and lumbar spines at the request of Attorney Daniel Daboval, Counsel for the third party defendant. He opined that Claimant sustained a strain of the cervical spine superimposed on minimal degenerative changes at the level of the 6th cervical vertebrae which is a possible aggravation of the degenerative process at this level. He concluded that Claimant also sustained a minor strain of the muscles and ligamentous structures in the lumbosacral region. He could not explain the continued discomfort in the cervical area and lumbar spine from the work accident with no objective findings of injury. He requested an opportunity to review diagnostic testing reported by Drs. Murphy and Walker. (EX-8, pp. 3-6).

On May 14, 2001, Dr. Cary reported on diagnostic testing provided to him by Attorney Daniel Daboval. He opined that the x-ray of June 19, 2000 from Terrebonne General Hospital revealed a negative lumbar spine. An MRI of the same date showed degenerative joint disease, particularly at L3-4 with some minor posterior protrusion of the disc and minimal degenerative protrusion at L4-5 and L5-S1 "felt to be of no significance other than the degenerative disc disease noted by desiccation of the disc at the L3-4 level." (EX-8, p. 1). Claimant had a positive EMG showing S1 radiculopathy bilaterally according to Dr. Cary. He did not agree with the opinion that Claimant was a candidate for lumbar surgery. (EX-8, p. 2).

Dr. Stephen M. Wilson

On October 8, 2002, Dr. Wilson examined Claimant at the request of the Carrier. He noted Claimant's prior back surgery by Dr. Adatto which Claimant reported "has not been of any great benefit." (EX-9, p. 16). After a physical examination and

review of x-rays, Dr. Wilson opined that Claimant had a 15% permanent partial impairment secondary to his work injury and subsequent surgery. With respect to his back, Claimant could return to some form of gainful activity, but should not lift over 50 pounds or more than 20 pounds on a regular basis and only occasionally bend, stoop, crawl or climb. (EX-9, p. 17).

In November and December 2002 and February and March 2003, Claimant followed-up with Dr. Wilson with complaints of continuing low back pain and received trigger point injections. (EX-9, pp. 12-15). On April 2, 2003, Dr. Wilson opined that Claimant was capable of gainful employment but was not motivated to return to work. (EX-9, p. 11). Claimant continued to receive periodic trigger point injections in 2003 through July 30, 2004 from Dr. Wilson. (EX-9, pp. 1-6, 9-10).

On July 2, 2004, the parties deposed Dr. Wilson. (EX-15). Dr. Wilson noted that Claimant did not complain of neck problems until March 10, 2003, but indicated he had neck problems "all along." (EX-15, pp. 3-4, 9). He observed that Claimant had no objective findings related to his neck. (EX-15, p. 3).

Dr. Richard R. Roniger

Dr. Roniger psychiatrically evaluated Claimant on October 26, 1999. Given multiple stressors in Claimant's life, Dr. Roniger agreed with Dr. David Mielke's diagnosis that Claimant suffered from an Adjustment Disorder with mixed anxiety and depression. (EX-10, pp. 1-4).

Dr. Rennie W. Culver

Dr. Culver rendered a report on July 18, 2000, to Counsel for the third party defendant in Claimant's civil suit. Dr. Culver diagnosed Claimant along Axis I as having a depressive disorder not otherwise specified with his health and history of cancer being "overwhelmingly the most significant etiologically." He opined that "whatever [Claimant's] orthopedic condition, it is obviously that such condition has never been life-threatening . . . ." (EX-11, pp. 1-15).

Kevin J. Bianchini, Ph.D.

Dr. Bianchini conducted a neuropsychological evaluation of Claimant on January 8-9, 2001. He obtained a vocational, social and medical history and administered testing of Claimant. He diagnosed Claimant with a Depressive Disorder NOS, Not Otherwise

Specified, in agreement with Dr. Culver. He opined that Claimant was not disabled from a psychological or cognitive perspective. (EX-12, pp. 3-22).

In a supplemental report of May 29, 2001, after reviewing additional medical reports, Dr. Bianchini opined that inconsistencies in Claimant's history and reports and non-organic findings were consistent with symptom magnification. (EX-12, pp. 1-2).

The Billings of Louisiana Clinic and St. Charles General Hospital

The itemized billings for The Louisiana Clinic are set forth in CX-2, pages 1-12 and CX-4, pp. 1-284 for the orthopedic services provided by Dr. Adatto and hospital services provided by St. Charles General Hospital for Claimant's October 18, 2000 lumbar surgery. The parties have agreed that the maximum amount of reimbursement sought is $61,440.78.

The Contentions of the Parties

Claimant contends that he requested authorization to treat with Dr. Adatto on September 21, 1998, which was rejected by Employer. (CX-4, pp. 16-17). Claimant asserts that on September 22, 1998, Employer circumvented his choice of physician by scheduling a September 24, 1998 appointment for Claimant with Dr. Cenac. (CX-4, pp. 1-2). Claimant attended the September 22, 1998 examination with Dr. Adatto who issued a report that day which was forwarded to Employer on September 25, 1998. (CX-4, pp. 21-25). Claimant further contends that all medical bills and reports were continually forwarded to Employer/Carrier throughout his treatment with Dr. Adatto.

On January 20, 1999, Counsel for Claimant specifically advised Counsel for Employer/Carrier that Dr. Adatto had recommended an anterior lumbar fusion at L3-4 and requested that Employer/Carrier "make the necessary financial arrangements for Mr. Allen to undergo the surgical procedure as recommended by his treating physician." (CX-4, p. 88).

Claimant further avers that Dr. Adatto's recommendations were reasonable and necessary as evidenced by the opinion of Dr. Murphy who conducted an IME at the request of DOL. Dr. Murphy concurred in the need for epidural steroid injections and lumbar surgery, the type of which should be decided by Claimant's treating physician. (CX-4, p. 209). Claimant contends that

after Dr. Murphy's report, DOL recommended "Employer/Carrier authorize the recommended testing prior to authorizing the recommended surgery . . . ." (CX-4, p. 210). Claimant avers he underwent the recommended surgery on October 18, 2000, after providing Employer/Carrier with the details of the surgery. (CX-3, p. 19; CX-5).

Employer/Carrier contend Claimant initially requested authorization to treat with Dr. Christopher Cenac. Claimant's request to treat with Dr. Adatto in New Orleans, Louisiana was denied because Dr. Adatto was located outside the 25-mile radius of his Morgan City, Louisiana residence when competent specialists practice within the geographical area. They further aver that no request for authorization for additional testing before the lumbar surgery was ever made to Employer/Carrier. It is asserted that Counsel for Claimant was guarantor for the surgery and went forward with the surgery without authorization and no opportunity to resolve the necessity for surgery before DOL. Furthermore, Employer/Carrier claim that Dr. Adatto initially recommended conservative treatment no different than that offered by Dr. Bourgeois, Employer's doctor, and that the lumbar surgery performed was not reasonable or necessary.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain

Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Prefatorily, it is noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct, 1965, 1970 n.3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physician rule in which opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378, 393 (5th Cir. 2000)(in a Social Security matter, the Court noted that a treating physician's medically supported opinion as to the existence of a disability is binding on the fact-finder unless contradicted by substantial evidence to the contrary).

Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187 (1988).

Under Section 7(d) of the Act, an employee is entitled to recover medical expenses/benefits if he requests the employer's authorization for treatment, the employer refuses the request and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. See Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996); Wheeler v. Interocean Stevedoring, 21 BRBS 33 (1988); Ezell v. Direct Labor, Incorporated, 37 BRBS 11, 19 (2003); Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986). The issue of whether treatment is reasonable and necessary is a question of fact for the administrative law judge. Weikert v. Universal Maritime Service Corporation, 36 BRBS 38, 40 (2002).

Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is released from the obligation of continuing to seek employer's approval. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

A. Request for Treatment

Section 702.403 of the Act's regulations provides that Claimant shall have the right to choose his attending physician to furnish care and treatment.

The record clearly establishes that Claimant was referred to Dr. Bourgeois by Employer upon his return to shore. Dr. Bourgeois's credentials are not of record but he appears to be a general practitioner without any specialty. Claimant did not

choose Dr. Bourgeois as his treating physician.

Furthermore, contrary to Employer's argument, the record is devoid of any request by Claimant to be treated by Dr. Christopher Cenac, with the exception of the self-serving letter of Mr. Floyd Sibley. There is no record evidence Claimant requested treatment from or designated Dr. Cenac as his treating physician. The record does not support a finding that an appointment had been scheduled for Claimant with Dr. Cenac before September 21, 1998. Rather, it appears the appointment was made the same day Claimant requested authorization to treat with Dr. Adatto. I so find in the absence of any convincing evidence otherwise.

Based on the instant record, I find and conclude that on September 21, 1998, Claimant requested his first choice of treating physician, Dr. Kenneth Adatto. It is undisputed that Employer refused to authorize treatment by Dr. Adatto. Although not entirely applicable but instructive is Section 702.406 of the Act's regulations which indicates that an employer **must** consent to a claimant's request to change physicians where the claimant's initial choice of physician was not a specialist whose services are necessary for proper treatment of the injury. Here, Claimant chose Dr. Adatto, an orthopedic specialist, as his initial choice of physician.

Equally unconvincing is Employer's argument that it refused to authorize Dr. Adatto because his office location exceeded the 25-mile radius set forth in the regulations. Employer conceded Dr. Cenac's office location also exceeded the 25-mile radius, but was willing to authorize his services. Moreover, although travel expenses for medical purposes are recoverable by Claimant, which is a relevant factor to be considered in determining the reasonableness of Claimant's request, in the instant case Claimant waived any mileage reimbursements to which he may be entitled for travel to seek medical care and treatment. See generally, Welch v. Pennzoil Co., 23 BRBS 395, 401 (1990).

Furthermore, Employer's argument that similarly qualified physicians were available to Claimant in the geographical area of Houma, Louisiana is not factually supported by the record. The record does not contain any evidence of credentials or qualifications of any physicians or prevailing community charges for similar care upon which a comparison of qualified physicians/specialists in the geographical area of Morgan City or Houma, Louisiana vis-à-vis Dr. Adatto can be made.

Consequently, I find Claimant's choice of Dr. Adatto as his treating physician to be reasonable under the circumstances despite the travel required. Once an employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant need only establish that the treatment and medical services were necessary and reasonable for his work injury in order to be compensable. Wheeler v. Interocean Stevedoring, supra; Rieche v. Tracor Marine, supra. Thus, the only remaining issue for resolution is whether the treatment and care procured by Claimant from Dr. Adatto was reasonable and necessary.

B. Reasonable and Necessary Care

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986).

Dr. Adatto is Claimant's treating physician from whom he received medical treatment and services. Dr. Adatto followed Claimant conservatively through February 1999 when Claimant reported his pain was worsening. Dr. Adatto recommended an anterior lumbar fusion. Because of Claimant's cancer treatment, surgery was postponed and Claimant received periodic injections for pain. In March 2000, Dr. Adatto observed that the herniation was then broad-based and had progressed from a Type IIa to a Type IIb. Surgery was performed on October 18, 2000.

Dr. Murphy, who conducted an IME for DOL, agreed that Claimant was a candidate for epidural steroid injections and lumbar surgery.

Employer relies upon the opinions of Drs. Walker, Cenac and Cary that Claimant was not a candidate for the recommended surgery performed by Dr. Adatto. Although Dr. Walker was of the opinion that Claimant should not undergo surgery because of a poorly defined diagnosis based upon primarily Claimant's subjective pain, there is no evidence that he ever reviewed the March 2000 MRI reflecting the progression of the broad-based herniation. For this reason, I find Dr. Walker's opinion is less persuasive than Dr. Adatto's opinion that surgery was necessary. Dr. Cenac's examination for Social Security was

conducted in June 1998, before the December 1998 MRI and March 2000 MRI. Dr. Cenac indicates that he reviewed the CT scan of December 1998, but there is no indication that he examined the MRIs of either date. Thus, in the absence of such review, Dr. Cenac's opinion is as equally uninformed as Dr. Walker's. Although Dr. Cary reviewed the latest MRI of June 2000 and disagreed with the opinion that Claimant was a candidate for lumbar surgery, he did not render an opinion that the recommended surgery was unreasonable or unnecessary, nor did Drs. Walker or Cenac. Dr. Wilson, to whom Claimant was referred by Carrier in 2002, noted Claimant reported that he had not received "any great benefit" from his back surgery, but did not opine as to the reasonableness or necessity for such surgery.

Based on the foregoing, I place greater weight and probative value on the opinions of Dr. Adatto, as a treating physician, and Dr. Murphy, an independent examiner. Employer/Carrier, as the proponent of the argument that the recommended surgery was unreasonable and unnecessary, have the burden of demonstrating that such surgery was not reasonable and necessary. I find that they have failed to establish their defense. None of the physicians upon whom Employer/Carrier rely provided any cogent support for their argument that such surgery was unreasonable and unnecessary. Drs. Walker and Cenac did not even review the latest diagnostic testing upon which Dr. Adatto relied in conducting the lumbar surgery. Dr. Wilson, who examined Claimant after the surgery, did not render an opinion regarding the reasonableness or necessity for the surgery performed. Accordingly, I find the lumbar surgery performed by Dr. Adatto to have been reasonable and necessary for the treatment of Claimant's lumbar condition caused by his work-related injury.

I find that after Employer/Carrier refused to authorize treatment with Dr. Adatto, Claimant was released from his obligation to continue to seek Employer/Carrier's approval for medical services and treatment provided by Dr. Adatto. Notwithstanding such a finding, I also find that Counsel for Claimant's January 20, 1999 letter advising of the recommended surgery and requesting Employer/Carrier to make the necessary financial arrangements for Claimant to undergo the surgical procedure as recommended by Dr. Adatto constitutes a request for authorization which Employer/Carrier ignored or constructively denied by their inaction.

Thus, based on the instant record, I find and conclude that Employer/Carrier are responsible for Claimant's work-related

injuries and its residuals including the reasonable and necessary medical expenses related thereto. Specifically, I further find and conclude that Employer/Carrier are responsible for any outstanding medical billings of St. Charles General Hospital and expenses for treatment by Dr. Kenneth Adatto of the Louisiana Clinic, and/or for reimbursement to the Law Firm of Wiedemann & Wiedemann for medical expenses paid in this matter on behalf of Claimant.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[3] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 9, 1998, work injury, pursuant to the provisions of Section 7 of the Act, including the medical billings related to services and

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[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **September 16, 2003**, the date this matter was referred from the District Director.

treatment provided by St. Charles General Hospital and Dr. Kenneth Adatto and/or reimbursement to the Law Firm of Wiedemann & Wiedemann for medical expenses paid in this matter on behalf of Claimant in the maximum amount of $61,440.78.

2. Employer shall receive credit for all compensation heretofore paid, as and when paid.

3. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days from date of service to file any objections thereto.

ORDERED this 20th day of June, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge